



## Rocky Road Seen in House:

# Freedom of Information Act Changes Approved by Senate

For the first time in a decade, the Senate has passed a bill making major changes in the Freedom of Information Act (FOIA).

The bill (S 774), passed by voice vote Feb. 27 after minimal debate, incorporates a number of changes sought by the Reagan administration, making it easier for agencies to close certain files from public view. It also makes changes sought by news organizations, such as providing financial incentives for agencies to comply with the act's deadlines for responding to FOIA requests.

Despite the harmony that greeted its passage in the Senate, the legislation faces a rocky road in the House.

Glenn English, D-Okla., chairman of the House Government Operations Subcommittee on Government Information, who waited until the Senate acted before scheduling action on FOIA, said his panel will hold hearings on the bill. It held hearings in the 97th Congress, and English said, "I came away unconvinced that major changes were needed." He added that "those seeking to change FOIA bear the burden of proof."

## Background

The Freedom of Information Act, originally enacted in 1966 (PL 89-487), requires the federal government and its agencies to make available to citizens, upon request, all documents and records except those that fall into specified exempt categories.

In 1974, over President Ford's veto, Congress strengthened the law, imposing deadlines for agencies to respond to requests and permitting federal judges to review agency decisions to classify certain material. (1974 *Almanac* p. 648)

President Reagan and some members of Congress say FOIA has been misused by organized crime syndicates

and other lawbreakers to evade criminal investigations or retaliate against informants. They want the law to provide greater protection against disclosure of sensitive government records, especially those related to national security and law enforcement.

In addition, the administration received complaints from businessmen



Rep. Glenn English, D-Okla., plans hearings on FOIA, but says past hearings left him "unconvinced that major changes were needed."

that trade secrets and other information they submitted to the government were being released under FOIA.

## Principal Changes

S 774, reported by the Judiciary Committee Sept. 12, 1983 (S Rept 98-221), is similar to a bill reported by the panel in the 97th Congress that never made it to the floor. (1983 *Weekly Report* p. 1020)

It would allow the attorney general to withhold information about law enforcement and investigations of organized crime, give agencies more time to release records and make it more

difficult to obtain information submitted by businesses to the government. It also imposes uniform fees, based on the actual cost of processing FOIA requests, to search for, process and copy requested government information. However, it would automatically waive those fees for journalists, scholars and non-profit groups.

Before passing the bill, the Senate adopted an amendment dropping two sections from the version reported by the committee.

One section would have exempted from the act technical data that may not be legally exported outside the United States. According to committee staff, that provision was inserted at the request of the Department of Defense (DOD); however, since the Judiciary Committee approved S 774, Congress passed a DOD authorization bill (S 675 — PL 98-94) providing the technical data exemption. (1983 *Weekly Report* p. 1694)

In addition, the amendment clarified that fees assessed for processing requests for commercially valuable technical information are user fees, not royalties. The word "royalty" led some senators to question whether S 774 was allowing the government to claim a copyright, which it is forbidden to do.

Orrin G. Hatch, R-Utah, chief sponsor of S 774, said it represented a compromise between those who wanted broad exemptions to FOIA and those who wanted to expand the flow of government information. It "eliminates many of the current problems of the act without weakening its effectiveness as a valuable means of keeping the public informed about government activities," Hatch said.

Similarly, Patrick J. Leahy, D-Vt., who fought administration efforts to weaken the act, said S 774 "recognizes the legitimate complaints of some agencies and submitters, while maintaining FOIA's major premises and all of its principal features."

## Provisions

As passed by the Senate, S 774:

### Fees and Waivers

- Authorized the Office of Management and Budget to promulgate guidelines to all federal agencies to

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establish a uniform schedule of fees.

- Permitted agency fee schedules to provide for recovery of the costs of reviewing records to determine what material should be released and what should be withheld.

- Permitted agencies to assess a "fair value fee," in addition to other processing fees, in the case of a request for records containing commercially valuable technical information generated or procured by the government at substantial cost to the public.

- Required agencies to waive fees for scholars, representatives of the news media and non-profit groups; prohibited fee waivers if the material was for commercial use.

- Permitted agencies to retain one-half of the fees they collected, if they were in substantial compliance with the time limits in the act; required agencies to apply that money to offset their own costs of complying with FOIA disclosure requirements.

**Time Limits**

- Provided for an extension of 30 working days for agencies to respond to requests and appeals, in addition to the existing deadline of 10 working days for a response to an initial request and 20 working days for response to an appeal. The total period for responding should not exceed 60 working days, except under "exceptional circumstances."

- Permitted extensions where the head of an agency specified in writing that processing a request would interfere with the timely performance of a statutory agency function; where an agency must notify submitters of information in order to consider objections to disclosure; and where an agency had "an unusually large" volume of requests or appeals.

- Required agencies to promulgate regulations to enable a requester who demonstrated a compelling need for expedited processing to be given priority over other requesters.

**Business Confidentiality**

- Required agencies to promulgate regulations specifying procedures by which submitters of trade secrets or confidential commercial or financial information could present claims of confidentiality; required agencies to notify submitters when they planned to release such information; permitted the submitter to object in writing.

- Waived the notification requirement when an agency decided a request should be denied; if the

submitter failed to substantially comply with the confidentiality rule, or if a law enforcement agency acquired the information in the course of a lawful criminal investigation.

**Judicial Review**

- Required that suits by requesters to release information denied to them be brought within 180 days of the agency's final administrative action.

- Required agencies to notify requesters and submitters whenever a suit was brought concerning a particular request or submission, and required equal treatment for both sides in the action.

- Allowed district courts to enjoin an agency from disclosing information if a submitter objected to disclosure. Submitter actions must be brought before the documents are released.

- Provided that a court may require a submitter to pay the attorney's fees of a requester who has substantially prevailed in the litigation. Under existing case law, courts may award attorney's fees against agencies.

**Law Enforcement Records**

- Broadened the exemption of law enforcement records and information regarding law enforcement techniques to include all law enforcement records and techniques, investigatory or non-investigatory.

- Broadened exemptions for protection of enforcement proceedings, personal privacy, identities of confidential sources and the life and physical safety of persons.

- Expanded the definition of confidential sources that may be protected to include state, local and foreign agencies and private institutions; exempted all information furnished by confidential sources, whether or not it was available elsewhere.

- Excluded from the requirements of the act information and records maintained by a law enforcement agency under an informant's name or other identifying name, if the requester is a third party seeking access by those names.

**Other Provisions**

**Public Record Requests.** Permitted an agency, where a portion of the records requested consists of public record, to furnish an index of the publicly available materials instead of the materials themselves, or provide the materials at the reasonable standard charge or, at the agency's discretion, at no charge.

**Internal Manuals, Examination Materials.** Exempted from disclosure materials related to an agency's internal personnel rules and practices; required agencies to demonstrate that disclosure could reasonably be expected to jeopardize its investigations, inspections or audits.

**Privacy.** Clarified that information about an individual would be exempt from the act whether or not it was filed under personnel or medical files; expanded the exemption to include information that could reasonably be expected to constitute an invasion of privacy or that could be used for solicitation purposes.

**Secret Service.** Exempted from the act information or records maintained by the Secret Service if the agency determined that disclosure could be expected to harm its ability to perform its protective functions.

**'Jigsaw Puzzle' Problem.** Permitted an agency, in deciding whether the release of particular information would be harmful, to take into account other information it knew or believed to be available to the requester.

**Request Restrictions.** Prohibited FOIA requests by foreign nationals; also authorized the attorney general to prescribe limitations or conditions on the use of the act by convicted felons.

**Discovery.** Prohibited a party to a judicial proceeding in which the government was also a party from using FOIA to obtain records that could be sought through the discovery procedure.

**Organized Crime.** Exempted from the act documents generated or acquired by a law enforcement authority in the course of an organized crime investigation within five years of the date of the request; provided that no document subject to this exclusion may be destroyed until the document has been available for disclosure for a period of at least 10 years.

**CORRECTION**

**D.C. South Africa Law.** Weekly Report p. 322, col. 3, fourth paragraph: The House District of Columbia Committee was discharged from consideration of a resolution disapproving the District's 1981 sexual assault law by a motion offered on the House floor by Philip M. Crane, R-Ill. The committee was not discharged by a discharge petition.